(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF DELAWARE,

Petitioner,

v.

ROGER ATKINSON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when considering a claim of error based on a mid-trial disclosure of *Brady* material, the reviewing court can disregard the tactical choices made by defense counsel in responding to the disclosure.

LIST OF PARTIES

All parties appear in the caption of the case as printed on the cover page.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Delaware, on behalf of the State of Delaware, respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court (App. 1-11) is officially reported at 778 A.2d 1058.

JURISDICTION

The judgment of the Delaware Supreme Court was entered July 18, 2001.[1] Timely cross-motions for reargument were denied August 23, 2001. App. 12-13. On November 19, 2001, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 21, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the judgment of the Delaware Supreme Court vacated one of respondent's convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of

[1] Delaware appellate procedure does not provide for any separate document known as a judgment. Instead, the Clerk of the state supreme court enters a docket notation based on the final paragraph of the written decision. *See* Del. Code Ann. tit. 10, § 162 (Repl. 1999).

the federal issue now presented.[2] *Florida v. Meyers*, 466 U.S. 380, 381 n.* (1984); *California v. Stewart*, 384 U.S. 436, 497, 498 n.71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Following a jury trial in the Delaware Superior Court, respondent Roger Atkinson was convicted of attempted second degree unlawful sexual intercourse, intimidation, tampering with a witness, and two counts of tampering with physical evidence. Respondent was later sentenced to 24 years imprisonment, suspended for probation after 10½ years imprisonment. The Delaware Supreme Court reversed respondent's conviction for attempted second degree unlawful sexual intercourse and remanded for a new trial on that count. App. 1-11.

1. Respondent and his estranged wife, Gaylene, rented a storage garage at a commercial storage facility in Newark, Delaware. On September 20, 1997, respondent, who is legally blind, arranged for Gaylene to rent a car to

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[2] *See* Del. Code Ann. tit. 10, §§ 9902(d), 9902(e), 9903 (Repl. 1999).

take him to the storage facility. They could not gain immediate access to the site because of a billing problem, the monthly payment not yet being received by the company. The difficulty was quickly settled, but respondent began yelling at Gaylene because of her failure to timely mail the payment, and the confrontation continued outside the office. Respondent and Gaylene entered their car and drove into the facility.[3]

As Gaylene recounted at trial, once in the garage, respondent asked her to clear space at the back and to then lay a tarpaulin and blanket on the floor for use in covering various electronic equipment. Gaylene did so, and she told respondent, who was standing outside, when she was finished. As respondent came in, Gaylene stepped to the side, but respondent grabbed her around the neck and pushed her towards the back of the garage. The two struggled, with respondent repeatedly striking Gaylene and brandishing a knife. Gaylene managed to throw the knife beyond respondent's reach when he dropped it during the affray. Respondent continued to hit Gaylene and demanded that she undress. She refused, respondent asking her "What's the matter? I'm just going to have sex with my wife."[4] Respondent then pinned Gaylene against some boxes and stripped her to her bra and panties. At this point, Gaylene shouted that someone was standing outside in front of the garage. Respondent was momentarily distracted, having fallen for Gaylene's ruse, and she fled, still wearing only her undergarments,

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[3] Tr. 81-85, 140, 147-48, 152, 156-57 (Aug. 10, 1999).

[4] Tr. 163 (Aug. 10, 1999).

to the facility office.[5] There, she told the manager, Sherry McCann, and another customer, James D. Sloane, Jr., that respondent had tried to kill her.[6] McCann called police who soon arrived, followed by paramedics and an ambulance.[7] That evening, after being released from the hospital, Gaylene gave a 40 minute taped statement to detectives, telling them that when respondent had told her to undress, he had said " 'I'm just going to have sex with my wife.' "[8]

2. A state grand jury initially returned a four-count indictment against respondent, charging him with attempted first degree unlawful sexual intercourse, aggravated menacing, and two weapons offenses. The prosecutor assigned to the case, Daniel Miller, had difficulty contacting Gaylene, who by now had moved out of state, and he came to believe that she would not appear for trial.[9] As a result, he contacted McCann, Sloane, and one of the patrolmen who had first arrived at the scene, attempting to determine if Gaylene had made any statement to them that might be admissible as an excited utterance.[10] Each of them recalled Gaylene hysterically telling him or her that respondent had "tried to kill her" or "pulled a knife on her," but none of them specifically

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[5] Tr. 158-66 (Aug. 10, 1999).

[6] Tr. 69-70, 86-87, 89 (Aug. 10, 1999).

[7] Tr. 87, 109, 111 (Aug. 10, 1999); Tr. 87 (Aug. 12, 1999).

[8] Tr. 167, 170-71 (Aug. 10, 1999); State's Ex. 6 (admitted into evidence Tr. 125 (Aug. 10, 1999)).

[9] Tr. 7-29, 46-47 (Aug. 12, 1999).

[10] App. 22-23, 24; Tr. 29-30 (Aug. 12, 1999). *See* Del. R. Evid. 803(2).

recalled Gaylene saying that the attack was an attempted rape.[11] App. 21, 23, 24-26.

Miller became a witness in connection with witness and evidence tampering charges stemming from respondent's efforts to persuade authorities that Gaylene had recanted,[12] and the case was assigned to another prosecutor. During his testimony, Miller referred to notes in order to refresh his recollection.[13] On a defense motion, the notes were given to counsel for review. After examining the notes, respondent moved for a mistrial because of the prosecution's failure to disclose the statements given to Miller by McCann, Sloane, and the patrolman. According to defense counsel, if he had known of the particular statements, he would have pursued on cross-examination

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[11] The officer told Miller "that he could not say to me that he recalled her saying anything about a sexual attack, although at the time, presumably based on her naked condition, he assumed that it was a sexual attack." App. 22. McCann told Miller that she had asked Gaylene "if she had been raped and [Gaylene] responded to her that she had not." App. 25. McCann, though, never asked her if respondent had tried to rape her, dropping the subject because of Gaylene's condition at the time. App. 29-30. Sloan told him that he did not recall any reference to a sexual attack. App. 26. Miller's impression was that all three had assumed the assault had been sexual in nature, given Gaylene's state of undress. App. 26.

[12] The grand jury returned a superseding indictment in December 1998, charging respondent with attempted first degree unlawful sexual intercourse, aggravated menacing, intimidation, tampering with a witness, two counts of tampering with physical evidence, and three weapons offenses.

[13] Contrary to the state court's reading (App. 2), Miller was not the prosecution's last witness; the investigating detective was.

of McCann that Gaylene had said nothing about an attempted rape. App. 28-29. The trial judge denied the mistrial request, observing that the notes added "almost nothing"[14] to respondent's case, respondent already being free to argue the point, based on the testimony of McCann and Sloane. App. 30-31, 32-33. Respondent's counsel did not question, either on cross-examination or in the defense case, Miller or the detective about Gaylene's statements at the scene. Respondent also did not call McCann, Sloane, or the patrolman to testify. In closing argument, both the prosecution and respondent discussed the relative weight the jury should give to Gaylene's silence. App. 35-37.

3. The Delaware Supreme Court reversed respondent's conviction for attempted second degree unlawful sexual intercourse, holding that Miller's notes should have been disclosed because they could be used to impeach Gaylene's initial statement to police and her testimony. App. 6. But because the information was disclosed during trial, the question was whether respondent had "an opportunity to use the material effectively nonetheless." App. 7. According to the court, and despite the trial judge's observations, respondent might have been able "to impeach Gaylene more effectively" if he had known earlier of her failure to mention respondent's attempt at rape. App. 10. Because the mid-trial disclosure made the evidence "unavailable for effective cross-examination," the court held this failure to disclose earlier

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[14] App. 32.

required reversal. App. 11. The court denied without comment cross-motions for reargument. App. 12-13.

REASONS FOR GRANTING THE PETITION

The Delaware Supreme Court held that the witness statements at issue could have led to more effective cross-examination of Gaylene. That was enough for the court to conclude that there was a reasonable probability of a different outcome if an earlier disclosure had been made. The court's sole focus on the effectiveness of cross-examination cannot be reconciled with the principle that decisions by defense counsel can both reflect the extent of any error and mitigate the error's effect upon the trial. Once competent counsel makes a decision about the appropriate response to a mid-trial disclosure of *Brady* material, the defendant's protection rests not in the Due Process Clause, but in the Sixth Amendment's guarantee of effective assistance of counsel.

1. The basic rule is that set out in *Brady v. Maryland*: the prosecution must disclose favorable evidence to the defense when that evidence is "material" to guilt or punishment. 373 U.S. 83, 87 (1963). And in *United States v. Bagley*, the Court defined materiality in terms of the effect that the evidence may have had upon the result of the trial. 473 U.S. 667, 682 (1985). That definition, as the Second Circuit has written, contains an intrinsic timing requirement: the information must be disclosed "no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made." *In re United States (Coppa)*,

267 F.3d 132, 142 (2d Cir. 2001) (citing cases). *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

2. But in the context of a mid-trial disclosure, it is not enough to look only at the effect on the outcome. Instead, the steps defense counsel takes in response to the disclosed information are also relevant. There had been no *Brady* violation, the Court decided in *Wood v. Bartholomew*, 516 U.S. 1 (1995), because "trial counsel's strategic decision to limit his questioning of [the witness] undermine[d] the suggestion by the Court of Appeals that counsel might have chosen to depose [the witness] had the polygraph results been disclosed. But of even greater importance was trial counsel's candid acknowledgment that disclosure would not have affected the scope of his cross-examination." 516 U.S. at 7-8. Thus, if despite the late disclosure, defense counsel chooses not to ask for a continuance or to present the information in some way to the jury, the defense has not made out a *Brady* violation.[15] The value of the evidence is secondary, the result reflecting instead defense counsel's perception of the usefulness of the information.

The importance of defense counsel's reaction cannot be overstated. The objection made by respondent's counsel certainly preserved the issue for further review, but

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[15] *See, e.g, United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990); *United States v. Ingraldi*, 793 F.2d 408, 411-12 (1st Cir. 1986); *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001); *State v. Sinchak*, 47 Conn. App. 134, 142, 703 A.2d 790, 795 (1997); *People v. Cortijo*, 70 N.Y.2d 868, 870, 517 N.E.2d 1349, 1350 (1987); *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996); *Yates v. State*, 941 S.W.2d 357, 364 (Tex. App. 1997, pet. ref'd); *Rodriguez v. State*, 962 P.2d 141, 145-46 (Wyo. 1998).

there is a broader reason to consider counsel's reaction. The Court has written in other contexts that counsel's decision not to object or to seek corrective action best reflects the extent and effect of the particular error and the appropriate response. *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988); *Greer v. Miller*, 483 U.S. 756, 764 n.5 (1987); *Estelle v. Williams*, 425 U.S. 501, 508 (1976). *See Engle v. Isaac*, 456 U.S. 107, 136 n.1 (1982) (Stevens, J., concurring in part, dissenting in part); *Henderson v. Kibbe*, 431 U.S. 145, 158 (1977) (Burger, C.J., concurring in judgment); *Estelle*, 425 U.S. at 514 (Powell, J., concurring) ("failure to object in itself is susceptible of interpretation as a tactical choice"); *Mullaney v. Wilbur*, 421 U.S. 684, 704 n.* (1975) (Rehnquist, J., concurring). After all, there are "countless ways" to defend,[16] and the defendant retains "primary control over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976). A trial judge could hardly override counsel's professional judgment about how to use the new information,[17] the defense having a substantial, if not overwhelming, interest in conducting its case as it desires. *See United States v. Jorn*, 400 U.S. 470, 486 (1971). *Cf. Geders v. United States*, 425 U.S. 80 (1976) (striking bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (improper to bar summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (striking down requirement that defendant be first

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[16] *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see Lakeside v. Oregon*, 435 U.S. 333, 344-48 (1978) (Stevens, J., dissenting).

[17] *See Lakeside*, 435 U.S. at 344 (Stevens, J., dissenting).

defense witness); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (striking bar on direct examination of defendant). The decisions required of defense counsel might be difficult, but having to make them did not make respondent's trial unfair. *See McGautha v. California*, 402 U.S. 183, 213 (1971).

To read out of the inquiry, as the state court did, the relevance of defense counsel's tactical decision is simply wrong. When the trial contains an error and defense counsel decides to limit his choice of remedy, the defendant's protection rests not in the Due Process Clause, but in the requirement of the Sixth Amendment that he receive effective assistance of counsel. An objectively unreasonable decision by counsel can always be challenged as ineffective assistance, but under the state court's approach, even if defense counsel made a reasonable tactical decision to get to what he hoped would be a winning verdict, a reviewing court can still declare the trial to be fundamentally unfair. That result is inconsistent with the limited reach of the Due Process Clause, *see Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991); *Dowling v. United States*, 493 U.S. 342, 352 (1990), and would make the Due Process Clause "a hedge against the strategic risks [counsel] takes in his client's defense in state court." *Reed v. Ross*, 468 U.S. 1, 14 (1984). *Cf. Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

3. Actions speak louder than words, and the decision by respondent's counsel to only talk about the issue in closing argument belies his assertion that he would have conducted his questioning differently. Counsel apparently turned down the prosecutor's suggestion to introduce the evidence through Miller, who was still on

the witness stand.[18] He also chose not to present the information through the investigating detective, the prosecution's last witness. Lastly, although other defense witnesses were presented, respondent's counsel chose not to have McCann, Sloan, or Gaylene herself testify in the defense case. Instead, he chose to argue to the jury that Gaylene's failure to mention at the scene any attempt to rape her was more probative than her subsequent account to police. That, as the trial judge observed, was the safest option, the witnesses thus being unable to explain any discrepancy and the prosecutor only being able to make the opposing argument. If the strategy elected by respondent's counsel is relevant to the analysis, as the courts of appeals and other state courts have held, then the decision of the Delaware Supreme Court here is wrong. If, instead, the only inquiry is the effect of the evidence on the result of the trial, then the Delaware Supreme Court is correct and the other federal and state courts have departed from the rule established by *Brady* and *Bagley*. In either case, review is warranted to resolve the issue.

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[18] "[O]ne way to remedy that at this point is to ask Mr. Miller about interviews he had with other witnesses to try to get over that problem because, certainly, there would be less prejudice if those quote, inconsistencies came out now through his testimony." Tr. 82 (Aug. 12, 1999).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
STATE OF DELAWARE

ROGER ATKINSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)	No. 572, 1999 Court Below – Superior Court of the State of Delaware in and for New Castle County I.D. #9709015038

Submitted: June 13, 2001
Decided: July 18, 2001

Before **VEASEY**, Chief Justice, **WALSH**, **HOLLAND**, **STEELE**, Justices and **HARTNETT**, Retired Justice.* Upon appeal from the Superior Court. **REVERSED and REMANDED**.

Andrew G. Ahern, III (argued), Joseph W. Benson, P.A., and Jerome M. Capone, Wilmington, Delaware, for Appellant.

Timothy J. Donovan, Jr. and Paul R. Wallace (argued), Department of Justice, Wilmington, Delaware, for Appellee.

STEELE, Justice:

On August 13, 1999 a jury convicted Roger Atkinson of Attempted Unlawful Sexual Intercourse Second

*Sitting by designation pursuant to Art. IV, § 38, of the State of the Delaware Constitution and Supreme Court Rules 2 and 4.

Degree,[1] Act of Intimidation, Tampering with a Witness, and two counts of Tampering with Physical Evidence.[2] The jury, however, found Atkinson not guilty of the charges of Possession of a Deadly Weapon during Commission of a Felony (two counts) and Aggravated Menacing. Atkinson filed a timely notice of appeal.

At trial, Atkinson had moved for a mistrial based on an argument that the State had violated the principles set forth in ***Brady v. Maryland***,[3] by withholding or delaying disclosure of certain material evidence. Notes of witness interviews taken by an investigating prosecutor were not disclosed until that prosecutor testified as the State's final witness. Once discovered in cross-examination, they revealed that the complainant, the State's main witness, had not initially described a sexual component to the assault to three of the State's witnesses. The State's unilateral determination that it need not disclose the material, Atkinson argues, deprived him of an opportunity for effective cross-examination of three critical witnesses presented by the State.

Because we find the notes to be favorable to the defense and material in that their timely disclosure may have affected the outcome of the trial, we find that the Superior Court erred by denying the defense motion for a mistrial. We reverse the Superior Court's judgment and

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[1] The indictment originally charged Atkinson with Attempted Unlawful Sexual Intercourse First Degree.

[2] The State entered a *nolle prosequi* on Possession of a Deadly Weapon by a Person Prohibited before the case went to the jury.

[3] 373 U.S. 83 (1963).

remand this case for a new trial on the charge of Attempted Sexual Intercourse in the Second Degree.[4]

I

On September 20, 1997, Atkinson and his then estranged wife, Gaylene Atkinson, drove together to a commercial storage facility that they rented in Newark. Atkinson, who was legally blind, had asked Gaylene to drive him there. After they arrived, Atkinson learned that Gaylene had failed to pay the unit's rent. Nonetheless, the facility's staff permitted them to enter their storage unit. Atkinson and Gaylene began to argue about Gaylene's failure to pay the rent. Gaylene stated that after she and Atkinson entered the storage shed, Atkinson grabbed her by the neck and threatened her with a knife. After Atkinson allegedly forced her to remove her shirt, pants and shoes, Gaylene managed to break free. She ran to the storage facility office to call 911. Sherry McCann and James Sloan were in the facility's office when Gaylene entered. Gaylene stated that Atkinson had assaulted her and that she feared for her life. Because Gaylene was partially clothed, McCann asked Gaylene if Atkinson had raped her. Gaylene responded that he had not. Nor did

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[4] Atkinson also argues that the Superior Court erred by denying his Motion to Suppress Evidence based upon the warrantless search of the locked storage shed. Because we grant Atkinson a new trial based on the Brady violation, we need not address that argument. Since appellant conceded that the ***Brady*** argument did not apply to his other convictions, no new trial is ordered on (1) Act of Intimidation; (2) Tampering with a Witness; and (3) two counts of Tampering with Physical Evidence. Accordingly, those convictions are affirmed.

Gaylene state to Officer Buglio, one of the first police officers at the scene that there had been any sexual component to the assault.

Gaylene gave a statement to police later that night, stating for the first time that Atkinson had assaulted her with a knife and had attempted sexual relations. Twice before trial, however, Gaylene changed her statement regarding the alleged sexual assault. In fact, Gaylene recanted her evening statement about the alleged attempted sexual intercourse, but later indicated that Atkinson had forced her to recant. These statements by Gaylene led the State to charge Atkinson with intimidation and witness tampering.

Daniel Miller, the Deputy Attorney General originally assigned to prosecute the case, concerned that Gaylene might not testify consistently with her original statement to the police, if at all, contacted McCann, Sloan and Buglio during an investigation to determine if Gaylene had made any spontaneous utterances that could constitute admissible hearsay of actual attempted sexual intercourse. Miller took notes of his conversations with McCann and Sloan, including statements by McCann and Sloan that Gaylene had not mentioned any sexual component and had, in fact, denied that she had been "raped." Miller also contacted Officer Buglio who stated that Gaylene did not mention any sexual component to the assault while the police were at the scene. McCann and Sloan ultimately testified in the State's case in chief. Buglio did not testify at trial. In fact, at trial, the sole evidence of sexual intercourse came from Gaylene's testimony and any inference that might be properly drawn from her physical appearance immediately after the assault.

The State called Miller at trial to testify about the intimidation and witness tampering charges. During his testimony, however, he referred to his notes. Upon request, the Court permitted Atkinson's counsel to review Miller's notes. When Atkinson's counsel saw for the first time that McCann and Sloan had affirmatively discounted the spontaneous utterance theory, he immediately moved for a mistrial arguing that the State had failed to provide him information that would have been material to his effective cross-examination of McCann, Sloan and Gaylene. After argument, the Superior Court denied the motion.

II

This Court reviews *de novo* a defendant's allegation that the trial court committed an error in formulating and applying the law.[5] "In this case we confront another instance of the prosecution pressing the boundaries of propriety with the apparent hope that the issue is likely to be held harmless error."[6] Atkinson argues that the State violated ***Brady*** by failing to disclose notes reflecting Miller's conversations with McCann, Sloan and Buglio. Atkinson argues that the notes were material in that if he had them before trial, he would have been able to cross-examine McCann, Sloan and Gaylene about her failure to mention immediately after the incident any sexual component to Atkinson's assault. He argues that once he

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[5] *See Jones v. State*, Del. Supr., 745 A.2d 856, 860 (1999); *Downs v. State*, Del. Supr., 570 A.2d 1142, 1144 (1990).

[6] *Warren v. State*, Del. Supr., 633 A.2d 372, No. 535, 1992, Moore, J. (Nov. 1, 1993) (ORDER).

discovered the existence of the notes during Miller's cross and realized their significance, only a mistrial could remedy the prejudice the State caused by withholding the information until its last witness testified.

As we recently stated in ***Jackson v. State***,[7] "[e]ffective cross-examination is essential to a defendant's right to a fair trial. It is the 'principal means by which the believability of a witness and the truth of [her] testimony are tested.' "[8] In Delaware, "the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony."[9] As such, "[j]urors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility."[10]

Because the right to cross-examination is fundamental to a fair trial, a new trial will be ordered when the State fails to provide the defendant with material evidence that is favorable to the accused. "Impeachment evidence . . . falls within the ***Brady*** rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."[11]

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[7] Del. Supr., 770 A.2d 506 (2001).

[8] ***Id.*** at 515 (citing ***Fensterer v. State***, Del. Supr., 493 A.2d 959, 963 (1985)).

[9] ***Id.*** (citing ***Pryor v. State***, Del. Supr., Del. Supr., 453 A.2d 98, 100 (1982)).

[10] ***Id.***

[11] ***Id.*** (citing ***Michael v. State***, Del. Supr., 529 A.2d 752, 756 (1987)); *see also* ***Bagley v. United States***, 473 U.S. 667, 675 (1985).

In ***Brady v. Maryland*** the United States Supreme Court held that the State cannot suppress evidence favorable to a defendant if that evidence is material either to guilt or to punishment.[12] If the evidence is both favorable and material, a determination must be made whether its "delayed disclosure precluded . . . effective use of the information at trial."[13] If the defendant was unable to use the evidence effectively because of delayed disclosure, a new trial is warranted.

A delay in disclosing impeachment evidence may not be material if the defendant has an opportunity to use the material effectively nonetheless.[14] When "a defendant is confronted with delayed disclosure of ***Brady*** material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively."[15]

In ***Strickler v. Greene,***[16] the United States Supreme Court explained the meaning of the term "Brady violation" and "the special role played by the American prosecutor in the search for truth in criminal trials."[17] The United States Supreme Court describes the "special status" of the prosecutor as follows:

> [T]he representative not of an ordinary party to a controversy, but of a sovereignty

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[12] 373 U.S. 83, 87 (1963).

[13] ***Lilly v. State,*** Del. Supr., 649 A.2d 1055, 1057 (1994).

[14] ***See Rose v. State,*** Del. Supr., 542 A.2d 1196, 1199 (1988) (citing ***United States v. Johnston,*** 1st Cir., 784 F.2d 416, 425 (1986)).

[15] 542 A.2d at 1199.

[16] 527 U.S. 263 (1999).

[17] *Id.* at 279.

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[18]
>
> * * * *
>
> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "***Brady*** violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called "***Brady*** material" – although, strictly speaking, there is never a real "***Brady*** violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true ***Brady*** violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.[19]

In this case, as in most cases where the issue of a "***Brady*** violation" is raised, the focus is on the third component – materiality.

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[18] ***Berger v. United States***, 295 U.S. 78, 88 (1935).

[19] ***Strickler***, at 281-282; *see also* Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REVIEW 1379 (2000).

The United States Supreme Court expanded the definition of materiality in *Kyles v. Whitley*.[20] In *Kyles*, the Court held that materiality does not require a showing that the suppressed evidence ultimately would have resulted in an acquittal. Rather, the *Kyles* Court required that the defendant, in light of the undisclosed evidence, receive a fair trial, "understood as a trial resulting in a verdict worthy of confidence."[21] Thus, in order to show a reasonable probability of a different result, a defendant need only show that the suppressed evidence "undermines [the] confidence in the outcome of the trial."[22]

Here, Gaylene's inconsistent positions cause the State to attempt to bolster its case by an effort to discover admissible hearsay evidence of spontaneous utterances to support Gaylene's most recent version of the facts in the event she would not be forthcoming on the stand. The State's further inquiry disclosed that she did not initially claim that Atkinson had attempted sexual intercourse. Nonetheless, the trial prosecutor unilaterally determined that notes documenting that fact would neither be favorable to the defense nor aid in defense counsel's cross-examination of three of the State's witnesses, and he concluded that he need not disclose them.

The complainant's credibility on the critical issue of the circumstances surrounding the assault was undeniably central to the case. The jury disbelieved her claim that Atkinson had used a weapon during the assault and

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[20] 514 U.S. 419 (1995).

[21] *Id.* at 434.

[22] *Id.*

found Atkinson not guilty of three related offenses. Atkinson may have been able to use the notes to impeach Gaylene more effectively if he had known in a timely manner of her earlier inconsistent statements to McCann, Sloan and Buglio. Attempted sexual intercourse, after all, was the critical element of a crime that carries a minimum ten-year imprisonment. Because the notes suggested inconsistent statements by the alleged victim, use of the notes may have impacted the jury's assessment of Gaylene's credibility and therefore the outcome of the trial on the charge of Attempted Unlawful Sexual Intercourse Second Degree. The fact that the State intentionally withheld that information until ordered to turn it over by the Superior Court after those witnesses who would have been cross-examined had already testified causes us to question whether this trial resulted in a verdict "worthy of confidence."

Applying the *Kyles* test, it is clear that the delayed disclosure constituted a suppression of favorable evidence that would be material to impeachment of one or more key witnesses. Gaylene's credibility would have been significant to the jury and an opportunity for effective cross-examination was essential for Atkinson to receive a fair trial. Had the notes been made available to defense counsel before trial, the cross-examination of these witnesses may have changed the outcome of the trial. The verdict on the lesser included offense, demonstrates the jury's reluctance to accept Gaylene's testimony touching upon the gravity of the charges in their entirety.

This evidence was both favorable to Atkinson and material in that it may have affected the outcome of the trial. Because the State withheld this evidence making it

unavailable for effective cross-examination, we must conclude that there is a "reasonable probability of a different result" had the favorable evidence the State withheld been provided in a timely fashion. The Superior Court should have granted the Motion for a Mistrial. Therefore, we reverse the judgment of the Superior Court and remand this case for a new trial.

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

ROGER ATKINSON,	)	
Defendant Below, Appellant,	)	No. 572, 1999
v.	)	Court Below – Superior Court of the State of Delaware in and for New Castle County
STATE OF DELAWARE,	)	
Plaintiff Below, Appellee.	)	I.D. #9709015038

Submitted: August 2, 2001
Decided: August 23, 2001

Before **VEASEY**, Chief Justice, **WALSH, HOLLAND, STEELE**, Justices and **HARTNETT**, Retired Justice.*

ORDER

This 23rd day of August, 2001, the Court having considered the parties' motions for reargument dated August 2, 2001, and it appearing that the motions are without merit,

NOW, THEREFORE, IT IS ORDERED that the motions be and the same hereby, are,

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*Sitting by designation pursuant to Art. IV, § 38, of the State of the Delaware Constitution and Supreme Court Rules 2 and 4.

DENIED.

BY THE COURT:

/s/ Myron T. Steele
Justice

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

v

ROGER ATKINSON

Defendant.

CR.A. Nos. PN98-12-2016,
IN98-12-2049;
IN98-12-2048;
IN98-12-2080;
IN98-12-2022

Thursday, August 12, 1999

BEFORE: HON. FRED S. SILVERMAN, J.
AND JURY

APPEARANCES:

PAUL WALLACE, ESQ.
Deputy Attorney General
On behalf of the State
JEROME M. CAPONE, ESQ.
On behalf of the Defendant

Trial

SUPERIOR COURT REPORTERS

1020 King Street – Wilmington, Delaware 19801

(302) 577-2400 x. 416

[Excerpt of Proceedings
August 12, 1999]

* * *

[117] THE COURT: Good afternoon, counsel. Where do we begin?

MR. WALLACE [prosecutor]: I suppose if we deal with the Jencks matter first, your Honor, I'm handing up to the Court – I think Mr. Capone and I agree – copies of the notes the Court ordered me to turn over [118] this morning. There are highlighted sections in there which Mr. Capone argues are Jencks material which should have been turned over.

THE COURT: All right. Let me see them, please.

MR. CAPONE [defense counsel]: We'd like that marked as a Court exhibit, your Honor.

THE COURT: Very well.

THE CLERK: Marked Court Exhibits 1 and 2, your Honor.

(Exhibits Court 1 and Court 2 received into evidence.)

THE COURT: All right. Mr. Capone, what's your point?

MR. CAPONE: Okay. There were three sections of these documents. One is notes of a conversation with which I assume Mr. Miller had with Officer Buglio, and Officer Buglio relates that he was speaking to Gaylene Atkinson and says, "Talk with her, pulled knife, and he's recounting what she says, "pulled knife, shut up or," quote, "going to stick her. She was all upset and crying, back hurt." Then there's the sign, meaning no evidence or nothing [119] relating to a sexual attack, "nothing on sexual attack," although the notes continue, quote,

"although I assumed it." So, that's the first thing that I'm concerned about.

The next thing is, in the other package, on the third page, and this concerns a telephone conversation that the prosecutor apparently has with Sherry McCann, who was the witness from the storage facility that testified here. And she says in quotes, "tried to kill me," apparently recounting what Gaylene Atkinson said, and then says "witness specifically asked witness if she had been raped and she said no." That's No. 2.

And No. 3 is a telephone conversation with Mr. Sloan, who was the customer of the storage facility, and that's dated October 7, '98, in which Mr. Sloan says, "I don't recall her saying it was a sexual attack" – those three things.

THE COURT: What's your concern?

MR. CAPONE: Well, Your Honor, prior to those witnesses beginning cross-examined, I asked for Jencks material on those things, on those witnesses, and was not provided with this information. The [120] information from Officer Buglio may even be Brady information. You know, no – that null sign, N-U-L-L, you know, is an indication of no evidence of or didn't admit to or denied.

MR. WALLACE: Well, actually, your Honor, I think what we need is a little interpretation of what those notes mean from Mr. Miller because they are his notes.

THE COURT: You make a proffer as to what the circle with the line scratched through it mean?

MR. WALLACE: What Mr. Miller would state is, at this point in the case, he believes he's not going to

have the victim, so he is calling the various witnesses to see what they're excited utterance statements may be, things like that. He asked Detective Buglio, "Did she say anything about a sexual attack?" and, basically, Detective – Officer Buglio said, that means, you know, he didn't hear her say anything about sexual attack, he just assumed it. And, you know, "Although I assumed it," and he explained to Mr. Miller, she's there in her underwear, I assume that, but she didn't say anything, specifically anything to me. He didn't ask [121] her any questions, she didn't say anything specifically about sexual attack.

Officer Buglio hasn't been called so it's hard to believe that's Jencks material. It's not a verbatim statement from anybody who has been called and it's not Jencks material nor Brady because a nonstatement is not Brady. He's been given all the statements by other witnesses. No one has ever said she yelled out rape, rape, "He raped me," or anything of the like. Her statements have always been very consistent about the, "Shut up or I'll stick you" to Miss McCann, "I think he's going to kill me," those type of things.

As to Officer Buglio, certainly, there's no Jencks violation nor Brady violation.

THE COURT: Sir, my question to you was, what does the circle with the line through it mean?

MR. WALLACE: That means made no statement about sexual attack. Officer Buglio heard no statement about sexual attack. Correct?

MR. CAPONE: Your Honor, if I can just interpose something at this point, that note says, "Later, I talked with her." He talked with her. [122] This indicates to me, when he says he talked with her, that he's having a conversation with her as opposed to just listening to comments she made and managing to overhear them. I talked with her and she said this is what he said, apparently.

THE COURT: All right. Mr. Miller, take the stand.

MR. MILLER: May I bring my notes, your Honor?

THE COURT: Whatever you want.

DANIEL MILLER, having been previously sworn, was examined and testified as follows:

MR. WALLACE: Just those notes.

THE COURT: The note from 3/18, 1998 –

THE WITNESS: Yes, sir.

THE COURT: Mr. Capone, do you have any questions for Mr. Miller about that note?

MR. CAPONE: 3/19/98?

THE COURT: Yes, the one about shut up or he's going to stick her.

MR. CAPONE: I do have questions for him about that.

THE COURT: Ask them.

[123] MR. CAPONE: Thank you, your Honor.

EXAMINATION

BY MR. CAPONE:

Q Mr. Miller, where were you when you had this conversation with Trooper Buglio?

A I thought we were talking about Miss McCann. Give me a second.

I don't know the answer to that. I don't know where I was.

Q Why were you interviewing him?

A In preparation for trial.

Q Why did you think that he might be someone who could be a witness in this case?

A Because he is listed in one of the police reports as having been involved in the incident.

Q Okay. So, were you able to see a police report that he wrote involving the incident?

A I don't recall if there's one that he wrote or not. There could be.

Q So, you may have seen a police report from Officer Buglio relating to this incident?

A I may have.

Q Okay. And why did you think – if you [124] didn't see a police report, how did you come to think that he might be involved in the –

A I didn't say that I didn't see one.

Q All right. What information did you think he might have about the case?

A I knew that he was one of the officers that was dispatched to the scene so, obviously, he knew something about it that – by virtue of the fact that he went there, whether he wrote a report or he didn't.

Q Did you ask him whether he spoke to Gaylene Atkinson?

A Yes.

Q Did he tell you that he did, in fact, speak with her?

A Yes.

Q And what did he – did he tell you he asked her about?

A He told me that Barrett had done the initial interview and he – Officer Barrett, that is, had done the initial interview at the scene. Actually, I'm not sure where Barrett talked to her. But Buglio told me, according to my notes, that [125] Barrett talked to her. And I know from the fact that I had the case, that Barrett was the person that did the initial interview. Buglio secured the scene, meanwhile, while that was occurring, and later, whether that was at the scene or not, he talked – when I say "he," I mean Buglio talked with Miss Atkinson.

Q Okay. Do you know how long that conversation lasted?

A I took – my impression was that they were casually talking and this is not an interview for the purpose of an investigative report.

Q Why is that your impression?

A Because the initial interview was taken by Barrett. And by most police department procedures, once there's been an initial interview, the next interview is by the detectives.

Q Is that what he told you, though?

A No, that's just what I know. You asked me why that's my impression. I'm telling you.

Q Did he ask her questions about what happened?

A It appears – it says I talked with her, [126] so I assume that they had a conversation. Whether he was asking questions or not, I don't know.

Q And you chose to use quotation marks around a particular phrase, "going to stick her," closed quote.

A Right, yes.

Q Now, why did you choose to put those words in quotation marks?

A I can't remember.

Q Okay.

A I – go ahead.

Q "All upset, crying, back hurt," who do you think said that?

A I believe that Buglio was telling me what his observations were about her being all upset and crying and, then, the words "back hurt" meaning she reported to him at some point that her back was in pain.

Q Now, Mr. Miller, you know and I know that you asked this man, did she say anything about the fact that he was trying to rape her?

A Yes, I did ask that.

Q And, so, when you asked him that [127] question, what did he say?

A He said that he did – I didn't ask him whether he asked her that.

Q Right.

A What I'm asking him at this point, I'm trying to set this case up to prove it without her being present, and I'm looking for an 803(2) statement.

Q Right.

A I asked him, "Did you at any time hear her say anything about being sexually assaulted?" His answer was, "I don't recall or negative, I didn't hear that, although I assumed it."

So, what that line means is that he didn't directly ask her that, but that he could not say to me that he recalled her saying anything about a sexual attack, although at the time, presumably based on her naked condition, he assumed that it was a sexual attack.

Q But you're saying to me now you recall that he did not ask her that?

A I'm telling you that it is my impression that he did not specifically ask her, did this – was [128] there any kind of a sexual attack, because he assumed that there was based on her condition and that he did not – he didn't ask her that specifically and she did not offer any information that he recalled about it being a sexual attack.

Q Did you ask him what it was that he did ask her?

A No. I told him what happened when I talked to her. I mean, you're asking me about a conversation that took place 14, 15 months ago. I'm telling you that I was looking specifically for information for an excited utterance type of a statement to prove the attempted unlawful sexual intercourse in the event of the victim's nonappearance. He told me he didn't recall her saying anything about a sexual attack, but he assumed that that's what it was based on her condition.

MR. CAPONE: I don't have any other questions on this.

THE COURT: Do you want to ask any questions of Mr. Miller on this point?

MR. WALLACE: No.

THE COURT: Do you want to ask Mr. Miller [129] any questions about the Sherry McCann statement, Mr. Capone?

MR. CAPONE: Yes, Your Honor.

BY MR. CAPONE:

Q Did you interview Sherry McCann?

A Yes.

Q Did you interview her on October 22?

A Yes.

Q And that would have been 1998?

A I believe '97, but I'm – I believe '97.

Q Okay.

A I'm not sure about that, though.

Q And did you ask her questions and record her responses?

A I didn't record them in cassette form, but I wrote notes about what our conversation consisted of.

Q And did you write down in quotes, "Tried to kill me," closed quotes?

A Yes.

Q Okay. Was that a quotation of what Miss McCann was saying Gaylene Atkinson – she heard Gaylene Atkinson say?

[130] A That's my interpretation of the note.

Q Okay. Do you recall whether you heard Miss McCann say to you that she specifically asked Gaylene Atkinson if she had been raped and Gaylene Atkinson responded that she had not?

A Do I specifically recall that? No. But my note, I wrote it down that exact way, so I assumed, based on my note, that I was questioning her with similar motive in mind – that is, to find out whether there was an 803(2)

statement that I could use, and she told me that – that McCann told me that she asked the victim if she had been raped and victim responded to her that she had not.

Q Mm-hmm.

A Which wasn't consistent with the reporting to me. It was reported as an attempted unlawful sexual intercourse, so that was – I was disappointed that there wasn't a comment about the sexual content, but that was it.

Q Okay. And, then, on March 30, '98, did you – strike that. I'm sorry. That's a mistake.

On October 7, '98, did you have an interview with Mr. Sloan?

[131] A When you say interview, I did – I've never spoken to Sherry McCann in person.

Q A phone interview?

A A phone interview, yes. I called the person who answered the phone as Sloan.

Q So, you had a phone conversation with a man named Sloan?

A Right.

Q And did you ask him what Miss Atkinson had said as she went to the office of the storage facility?

A No. What I did was the same thing I did with everyone else that I'm talking about. I interviewed them and said, "What is your recollection of the event?" They told me what their recollection was. And, then, just like

with the others, I asked Sloan, "Did you – do you recall there being anything about it being a sexual attack?" the incident. And his answer was, "I don't recall her saying it was a sexual attack."

And the impression I had from all three people was that they all assumed that it was a sexual attack, but that's – that's my impression.

[132] Q Did you provide any of this information based on these three interviews we just discussed to Mr. Atkinson's defense team at any point?

A No. I regard it as outside the scope of Brady and discovery.

MR. CAPONE: All right, no further questions.

EXAMINATION

BY MR. WALLACE:

Q Mr. Miller, are these your handwritten notes as you're talking to folks?

A Yes.

Q Some things you quote, some things you don't; correct?

A That's right.

Q It's not a verbatim transcript?

A Right.

Q You didn't call back to them and – or read back your notes to them and say, "Is this correct?"

A No, I never did. These are my interpretation of what I was told.

Q Just on Mr. Sloan, I think you made it [133] clear with Miss – Officer Buglio. Actually, you don't even put the "I don't recall her saying"; you just put, "don't recall her saying it was a sexual attack"; correct?

A Yes, but that's what I'm – I'm talking about Sloan saying that he does not recall Atkinson saying that it was a sexual attack.

Q Okay.

A Even though I didn't put the word "I" in there, I'm confident, based on my note, that's what that means.

Q And it's not clear that anybody – that he specifically said, "Did you get raped?" or, "Was this a sexual attack?" It's just what she's blurting out?

A The only person – my understanding is that the only person asked her whether she had been raped or not of these three people was McCann. So, yes, the answer is he was – he didn't ask her, she didn't tell him, so – and he didn't recall anything of that nature.

Q And as to Miss McCann, that was not inconsistent with what you believed or you knew to [134] actually happen; correct?

A The allegation was an attempted rape, so no rape had ever occurred.

MR. WALLACE: Okay. Thank you, I have nothing further.

MR. CAPONE: Nothing further, your Honor.

THE COURT: Thank you. You may step down, Mr. Miller.

I believe there's a motion for a mistrial pending that Mr. Capone made before lunch. What's to be added to that, if anything?

MR. CAPONE: Your Honor, I think we flushed it out with the facts here. I maintain the motion. I believe that these were statements of witnesses who testified. I believe that the subject matter of these three particular notes was material to my cross-examination. I certainly would have touched upon these things if I had known they existed and woven them into my cross-examination at an appropriate time. And I think, to great effect, too, not to blow my own horn, but I think these were important points that needed to be made. And I didn't know they existed, I didn't know that there [135] were notes witnesses' or notes that support these things. So, I think my case has been jeopardized beyond repair at this point.

THE COURT: What would you have used this information for if you had known about it?

MR. [CAPONE]: What would it have been for?

THE COURT: Yes.

MR. CAPONE: To show that she did not allege that this was a sexual attack for the same reason that Mr. Miller was trying so hard to get somebody to say it. Mr. Miller obviously recognized the importance of this. He tries on three different occasions in these notes, "I'm looking for somebody to tell me that she gave an excited utterance or said anything about this being a sexual attack," because Mr. Miller then would have come into

Court and said, "Your Honor, the law recognizes that a person in an excited state is more likely to tell the truth than not to tell the truth." So, that's why I was trying very hard and asked three different people, "Hey, did you hear her say anything about a sexual attack or did you ask her about a sexual attack?" and everybody [136] came up negative. And he could have used that to his great effect had they said it.

Now, on the flip side of that kind, I'm trying to say that she didn't say it, and she was asked about it and she didn't acknowledge this was a sexual attack.

THE COURT: Who asked her about it?

MR. CAPONE: Well, McCann asked her about it. McCann said, "Were you raped?"

THE COURT: And at any point, has there ever been any evidence in this case that she told anybody that she was raped; and, to the contrary, hasn't the evidence been put in front of the jury repeatedly that there is no claim of actual rape here?

MR. CAPONE: Absolutely, absolutely. But what I've got here is a sketchy little note. And I would have gone further, I would have said, "Did you ask her if she was raped?" She said no. "Did you – did you ask her did he try to rape you?" "No."

MR. WALLACE: Actually, your Honor, to that question, I know that Miss McCann's answer would be, because I asked her that very question, because [137] she told me. She never said, "I asked her was she raped and she said no. But I never asked her if he attempted to rape her. I just let it alone because of the way she was." So,

you know, quite frankly, Mr. Capone wouldn't have gotten any. Where these aren't Jencks material, these aren't verbatim text.

Hooks, H-O-O-K-S, specifically says prosecutors' notes are not Jencks material. And, in fact, the case of United States v. North American Reporting, 761 F.2d 735 says that a prosecutor's notes, those of another agent of the State which contain incomplete selective summaries of witness statements are not a substantially verbatim recital of a witness's testimony even if they contain words and phrases quoting from an actual statement, 740. The Delaware Supreme Court has specifically held that to be true. Notes by agents, unless they've been adopted, which is what Jencks said, signed, read back, adopted by the person, they either have to be substantially verbatim or adopted in such a manner that they would be.

Moving on to Brady, the fact that she doesn't say something to Officer Buglio, nobody's [138] testified that she ever did. The fact she doesn't say something to Mr. Sloan about it being a sexual attack doesn't mean anything. Nothing prevented Mr. Capone in these circumstances from saying, "She never told you he tried to rape her, did she?" It had the same effect, no matter what.

THE COURT: Isn't the state of the record right now that Mr. Capone can argue and the State cannot contest the fact that none of those witnesses claimed that she said, "He tried to rape me." No one asked them, "Did you ask the hysterical woman if he tried to rape you." The argument that Mr. Capone wants to make is there – it seems to me, that this evidence, assuming that it went in

the way that Mr. Capone thinks it would go in, would do little except perhaps be cumulative for that point.

I think that there's a fundamental misunderstanding about the purpose of Jencks and the like. The prosecution is not holding back evidence that is going to be substantively helpful to the defense. Here, the defense can point to a few questions that it might have asked these witnesses and it could have asked these witnesses anyway. This [139] so-called Jencks material does not clue the defense into something new. It does not clue the defense into something that was not already in the case. It does not clue the defense into something about which the witnesses were not testifying and they would have testified if the defense had known about it.

It seems to me that, when the cloud around the defense allegations is removed, that there is very little of substance that these notes provide to the defense that was likely to be helpful, and it certainly does not provide anything to the defense that was not already on the table in front of the jury.

Unless I am missing something. Mr. Capone, you're telling me that, if you had known about these things, you would have woven them into the cross-examination and it would have had great effect. I don't see it.

MR. CAPONE: Well, if I would have known that I could safely ask a question and, "Isn't it true that she never said that her husband tried to rape her?" I would have asked that question.

MR. WALLACE: I don't think he still [140] could ask that question, because nobody asked her that

question. Even from Mr. Miller's viewpoint, Mr. Sloan didn't ask it and she didn't offer it. Officer Buglio didn't ask it, she didn't offer it. And even Miss McCann didn't say, "Did he try to rape you?" and she could have asked it. And I know what Miss McCann would have said if she was asked that question. She would have said, "No, because I never asked her, I left well enough alone."

He's not in any worse position than he had been if he had Mr. Miller's notes.

THE COURT: Mr. Capone has at least a small point for the proposition that, had he known what the answers would be, he could have asked questions of these witnesses, especially McCann, "At any time during your contact with the complaining witness, did she ever say that anything of a sexual nature took place?" and the answer to that question would have been no.

Now, it lends itself to all sorts of redirect along the lines of, "Did anyone ever ask you?" It opens the door to further exploration by the State of the fact that the woman had appeared in [141] a public place half undressed and hysterical. And that is really where my thinking has been focusing. Yes, the defense could have asked a few questions along the lines Mr. Capone has suggested with greater impunity if it had been aware of this material. That does not say much, however, and it adds almost nothing to what the defense can already argue, to what the State cannot dispute based on the evidence that is already in the record. Mr. Capone is free to say to the jury, "Miss McCann never said that anything of a sexual nature took place. Mr. Wallace never asked Miss McCann about that, and you can rest assured that, if

the complaining witness had said anything about anything sexual taking place, the State would have gone into it and you would have heard about it," and that sort of argument that we're all familiar with. And Mr. Wallace, at best, is going to be able to stand up and say, "Did you hear anything about her being asked those questions?" and that is exactly where the record would be if Miss McCann, for example, were brought back and questioned and cross-examined on this point.

So, I repeat, it seems to me that we have [142] lost very little, if anything, based on the defendant's unaware – being unaware of these notes.

* * *

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, ID 9709015038

Plaintiff,

v.

ROGER ATKINSON,

Defendant.

PN98-12-2016
IN98-12-2022
IN98-12-2048
IN98-12-2049
IN98-12-2080

BEFORE: HONORABLE FRED S. SILVERMAN, J.
and jury

APPEARANCES:

PAUL WALLACE, ESQ.
Deputy Attorney General
for the State

JEROME M. CAPONE, ESQ.
for the Defendant

TRIAL TRANSCRIPT
AUGUST 13, 1999

JEANNE CAHILL, RMR, CRR
SUPERIOR COURT OFFICIAL REPORTERS
1020 King Street – Wilmington, Delaware 19801
(302) 577-2400 Ext. 414

[Excerpt of Closing Arguments
August 13, 1999]

MR. WALLACE:

* * *

[15] She's in her bra and her underpants and her socks. And he comes out, You stupid bitch. Throws her shirt. She grabs it, puts it up to her, and runs hysterically to the office. People at the office told you what her state was.

I also guarantee that Mr. Capone will get up and say, But she didn't tell any of those people that [16] he raped her or that he tried to rape her, even. A hysterical woman in the middle of the day comes banging on this window in a public place.

First of all, she had to walk down or run down, I should say, a driveway like this in her bra and her panties, her socks, trying to hold a shirt up to her. Bangs on the window. He's trying to kill me. That's what she said. That's the first thing she's worried about.

And given the circumstances, he had the knife, he's been choking her, and she is hysterical, they tell you they can't get all that much out of her. They ask her, Are you hurt? Things like that. But most importantly is getting 911, getting that door locked, trying to see who this is.

She doesn't blurt out, you know, He's trying to rape me, he's trying to have sex with me, anything like that. Duh. Look at the circumstances. Does she have to say it at this point? Are they inquiring and having a nice calm conversation with her about all these things?

* * *

MR. CAPONE:

* * *

[45] Ladies and gentlemen, the State is asking you to convict Roger Atkinson despite the fact that they were unable to produce a single witness who spoke to Gaylene Atkinson in the first few hours after this alleged incident who heard her say that she claimed her husband was trying to rape her.

The first time that she says anything about rape or sex is when she tells this to Officer Henry on the videotape.

And you'll see that the videotape has a time on it. If you go back and look at the videotape – it will certainly be in evidence. You'll have the ability to look at it. And that tape is made, it says at 1800 hours and some minutes, which is military time, but it means 6:00. This is hours after [46] the incident allegedly occurred.

But prior to that point, let's think about all the people that Gaylene Atkinson came in contact with after she left E2. She went into the storage facility and she saw Miss McCann, she saw another employee of the storage facility, and she saw a customer, Mr. Sloane, and she spoke to all of them, and there's no evidence that she said anything about, "My husband is trying to rape me."

She said other stuff, "My husband is trying to kill me," but she didn't mention rape. Then police officers begin showing up on the scene, Officer Barrett, Officer Bulio [sic], and Officer Henry, and they speak to her, and she doesn't say anything about, "My husband was trying to rape me."

And then an ambulance comes, and she gets into the ambulance, and we can only assume that she had conversations about what happened to her with the ambulance attendants, but the fact of the matter is the State did not produce a single ambulance attendant to come in and tell you this woman said her husband had tried to rape her.

And we know that the ambulance then took her [47] to the hospital, where we can only assume from our experience that she was dealt with by nurses, admitting staff, and physicians.

And ladies and gentlemen, the State did not bring in a single admitting staff person, nurse or doctor who treated this lady to say Mrs. Atkinson told me that her husband tried to rape her.

The fact of the matter is Mr. Atkinson was not even arrested after he had been in the company of Detective Henry for at least an hour or two at the police station.

The incident happened, she's gone, he's allowed to leave. If she had said he was trying to rape me, if she had said that, would he have been allowed to leave? Could you believe the police would have let him leave?

He tried to rape me with a weapon. Can you believe for a moment the police would have said, Okay, you can go now? It just didn't happen that way. They let him go.

* * *

ORIGINAL

Supreme Court, U.S.
FILED
MAR 5 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF DELAWARE,

Petitioner,

vs.

ROGER ATKINSON,

Respondent.

No. 01-942

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

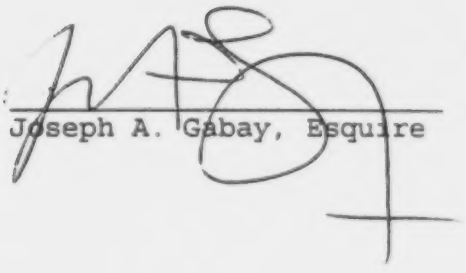
The Petitioner asks leave to file his Brief in Opposition to the Petition for Writ of Certiorari without requiring that the Brief be professionally printed and to proceed in forma pauperis.

Petitioner was previously granted leave to proceed in forma pauperis as a defendant in the Superior Court of the State of Delaware where he was represented by Jerome M. Capone, Esquire, a member of Delaware's Court-Appointed Conflict Attorney Program. On direct appeal his family was able to raise funds to hire private counsel but Mr. Atkinson remains indigent and his family is without further resources to hire counsel to defend this matter.

The undersigned was appointed by the Delaware Courts to handle this matter following the filing of the State's Petition for Writ of Certiorari. Like Mr. Capone I am a member of the Court-Appointed Conflict Program.

12 pp

Petitioner's Declaration in support of this motion is enclosed.



Joseph A. Gabay, Esquire

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF DELAWARE,

Petitioner,

vs.

ROGER ATKINSON,

Respondent.

No. 01-942

IN FORMA PAUPERIS DECLARATION

I, Roger Atkinson, having been duly sworn, do hereby declare that I am the Respondent in the above-entitled case. In support of my Motion to Proceed In Forma Pauperis I hereby aver the following:

1. Because of my poverty I am unable to pay the costs of said proceeding or give security therefore;

2. That I believe I am entitled to be represented in your Court and that the State of Delaware has appointed counsel to represent me;

3. That while I was represented by court-appointed counsel at trial my direct appeal was handled by private counsel due to the money raised by my family. Current counsel was appointed to handle my case following the reversal of my conviction;

4. I am not presently employed and am legally blind;

5. I have been only recently posted bail on the outstanding charge;

6. My only source of income is a disability check of $502.00 which I receive from the Social Security Administration;

7. I own no cash, checking or savings accounts;

8. I own no real estate, stocks, bonds, notes, automobiles or other valuable property;

9. I have children dependent upon me for support.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14 day of February, 2002.

PATRICIA FRY COX
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Sept. 8, 2002

Notary

Roger Atkinson

ORDER

Let the Respondent proceed In Forma Pauperis.

JUSTICE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF DELAWARE,

Petitioner,

vs.

ROGER ATKINSON,

Respondent.

No. 01-942

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH A. GABAY, ESQUIRE
901 Market Street
4th Floor
P.O. Box 590
Wilmington, DE 19899
(302) 655-6434

March 5, 2002

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF DELAWARE,

Petitioner,

vs.

ROGER ATKINSON,

Respondent.

No. 01-942

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Roger Atkinson, respectfully asks this Honorable Court to deny this petition seeking review of the judgment of the Supreme Court of Delaware, which reversed Mr. Atkinson's conviction and sentence on the charge of Attempted Sexual Intercourse in the Second Degree and remanded the case to the Delaware Superior Court for a new trial.

JURISDICTION

The decision of the Delaware Supreme Court was entered on July 18, 2001. That decision is officially reported at 778 A.2d 1058 (Del. 2001). Timely cross-motions for reargument were denied August 23, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1257.

COUNTER-STATEMENT OF THE CASE

On September 20, 1997 Respondent Roger Atkinson, who is legally blind, rode with his estranged wife, Gaylene Atkinson, to a commercial storage facility they rented in Newark, Delaware. Upon their arrival it was learned that Gaylene Atkinson had failed to pay the monthly rent. The staff permitted them to enter the unit anyway and it was there that they began to argue. 778 A.2d at 1060.

Gaylene alleged that upon entering the storage shed Respondent grabbed her by the neck and threatened her with a knife. She further alleged that he forced her to remove her shirt, pants and shoes, but that she was then able to break free and run to the storage facility where 911 was called. 778 A.2d at 1060.

When Gaylene ran into the facility's office both Sherry McCann and James Sloan were present. When asked by McCann if she had been raped she replied that she had not been raped but that Respondent had assaulted her and she feared for her life. Officer Buglio was one of the first police officers to arrive. She did not state to him that there was any sexual component to the assault. 778 A.2d at 1060-1061.

Later that evening she gave a statement to the police, mentioning for the first time that she had been assaulted with the knife and that Respondent had attempted sexual relations. Twice before trial however she changed her statement regarding the alleged sexual assault. Further investigation indicated that Respondent Atkinson was alleged to have forced her to recant and lead to new charges of an Act of Intimidation and Tampering with a

Witness. 778 A.2d at 1061.

Daniel Miller, the Deputy Attorney General originally assigned to prosecute the case, became concerned about the possibility of a further recantation during Gaylene's testimony. In addition to potentially determining whether there would be a basis to admit the prior statement under 11 Del. C. 3507 which permits the affirmative use of a voluntary out-of-court prior statement by a witness who is present and subject to cross-examination. This statute is rare in that it can be used exclusive of the Delaware Rules of Evidence to provide the prior statement with substantive independent testimonial value. Additionally, he clearly sought to interview witnesses McCann, Sloan and Officer Buglio to ascertain if any spontaneous utterances existed which could constitute admissible hearsay as it applied to the allegations of attempted sexual intercourse. 778 A.2d at 1061.

During each of those conversations the witnesses indicated that Gaylene did not mention a sexual component to the alleged assault. McCann and Sloan testified at trial on behalf of the State, but Officer Buglio was not called. 778 A.2d at 1061.

At trial Gaylene was the sole witness to provide oral testimony concerning any alleged sexual assault. The State also relied upon any inferences which might be properly drawn from her physical appearance when she enetered the facility office to call 911. As it penultimate witness the State called Deputy Attorney General Miller at trial to testify about the intimidation and witness tampering charges. During his testimony he referred to his

notes whcih defense counsel was then permitted to review. It was at that time that respondent's trial counsel first saw that McCann and Sloan, both of whom had already testified, had affirmatively discounted the spontaneous utterance theory. He immediately sought a mistrial whcih was denied. 778 A.2d at 1061.

Following deliberations, a New Castle County jury returned guilty verdicts as to the lesser-included offense of Attempted Unlawful Sexual Intercourse Second Degree, two (2) counts of Tampering with Physical Evidence and one count each of Act of Intimidation and Tampering with a Witness. Respondent Atkinson was found not guilty of two (2) counts of Possession of a Deadly Weapon During the Commission of a Felony and one count of Aggravated Menacing. A charge of Possession of a Deadly Weapon by a Person Prohibited was dropped by the State before the case was submitted for deliberations.

Following a timely appeal, the Delaware Supreme Court reversed the conviction of Attempted Unlawful Sexual Intercourse Second Degree and remanded the matter to Superior Court for a new trial. In reaching its conclusion the Delaware Supreme Court found that the actions of the State in failing to timely disclose notes of witness interviews taken by the investigating prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963) and required reversal.

REASONS FOR DECLINING REVIEW

In Brady v. Maryland, 373 U.S. 83, 87 (1963) this Court held that a State could not suppress evidence favorable to a

defendant if that evidence is favorable to either guilt or punishment. If a determination is made that the evidence is both favorable and material, then it must be determined whether the delay in providing the information precluded its effective use at trial. Lilly v. State, 649 A.2d 1055 (Del. 1994).

In making its determination the Delaware Supreme Court looked to this Court's decision in Strickler v. Greene, 527 U.S. 263 (1999) to review the meaning of a Brady violation and the role of the prosecutor in our adversarial system of justice. It quoted with favor the inclusion by the Strickler Court the language from Berger v. United States, 295 U.S. 78, 88 (1935) setting forth the special status of a prosecutor.

Here the failure to disclose was not merely a delayed disclosure. Making this matter more egregious was that but for the Deputy Attorney General referring to his notes while testifying, the inquiries made of the three witnesses, McCann, Sloan and Burgio, may have been silenced forever. Because Sloan, McCann and Gaylene Atkinson had already testified, the effective use of those notes was lost forever.

Next is the issue of materiality. As this Court noted in Kyles v. Whitley, 514 U.S. 419 (1995) materiality does not require a showing that the suppressed evidence would have resulted in an acquittal. Rather, the determination is whether the suppressed evidence undermines the confidence in the outcome of the trial. Id. at 434.

Here the Delaware Supreme Court, in its de novo review of

the trial court's actions Jones v. state, 745 A.2d 856 (Del. 1999), determined that Gaylene Atkinson's "credibility on the critical issue of the circumstances surrounding the assault was undeniably central to the case." 778 A.2d at 1063. Under Delaware law effective cross-examination is the means of testing before the jury the believability of the witness and truth of (her) testimony. "Jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility." Jackson v. State, 770 A.2d 506, 515 (Del. 2001), citing Fensterer v. State, 493 A.2d 959, 963 (Del. 1985) and Pryor v. State, 453 A.2d 98, 100 (Del. 1982).

In noting that the jury acquitted Respondent Atkinson of the weapons offenses despite the testimony of Gaylene Atkinson that he had used a knife against her, the Delaware Supreme Court found that those factors, combined with the disclosure only upon order of the trial court, require the conclusion that there is a "reasonable probability of a different result" had the favorable evidence been provided in a timely fashion. 778 A.2d at 1063, 1064.

Thus, any decision by this Court would be limited and defined by the peculiar facts of this case, and would have dubious applications to other cases.

Essentially the State of Delaware comes to this Court seeking error correction. However, it has been long established that this Court "do[es] not grant a certiorari to review evidence and discuss particular facts." United States v. Johnston, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to

serve purposes broader than the correction of error in particular cases." Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). See also Ponte v. Real, 471 U.S. 491, 501-502 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question of whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket.").

In opposing the State of Delaware's Petition, Respondent Atkinson asserts that not only was the decision below correct but that additionally, this case is a singularly inappropriate vehicle for consideration of the question presented by the petition.

CONCLUSION

The Petition for a writ of certiorari should be denied since it does not present any substantial reason which requires this Court to review the decision of the Supreme Court of Delaware.

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Dated: March 5, 2002